

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BOB MAC KIRKLAND, JR.,

Defendant-Appellant.

UNPUBLISHED
February 19, 2004

No. 244421
Allegan Circuit Court
LC No. 02-012309-FC

Before: Murray, P.J., and Murphy and Markey, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction by a jury of second-degree criminal sexual conduct (CSC-II), MCL 750.520c(1)(a). The trial court sentenced him to a term of 6 to 22½ years in prison. We affirm.

The instant case stems from allegations that defendant sexually abused his former girlfriend's daughter. The complainant, along with her mother and brother, lived with defendant from 1994 until 1996.

Defendant contends that the prosecution presented insufficient evidence to sustain his conviction. We review challenges to convictions based on the sufficiency of the evidence de novo. *People v Sherman-Huffman*, 241 Mich App 264, 265; 615 NW2d 776 (2000), aff'd 466 Mich 39 (2002). Prosecutors must introduce evidence sufficient to justify a rational trier of fact in concluding that all of the essential elements of the crime were proved beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). When reviewing its sufficiency, we examine the evidence in a light most favorable to the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). All conflicts in the evidence must be resolved in favor of the prosecution. *Id.*

Under MCL 750.520c(1)(a), a person is guilty of CSC-II if the person engages in sexual contact with another person less than thirteen years of age. *People v Piper*, 223 Mich App 642, 645; 567 NW2d 483 (1997). MCL 750.520a(n) defines "sexual contact" as "the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification, [or] done for a sexual purpose" The jury must make this determination based on an objective analysis

of the evidence. *Piper, supra* at 647. Intentional touching, alone, is insufficient to establish guilt. *Id.*

In the instant case, the complainant testified that she was ten years old at the time of the alleged events. She further stated that on the night of the incident, defendant told her to sit on his lap. He proceeded to touch her legs, breasts, butt, and crotch. He also rubbed the lips of her vagina and her clitoris with his hand. Based on this testimony, a rational jury could conclude beyond a reasonable doubt that defendant intentionally touched the complainant for the purpose of sexual arousal or gratification.

However, defendant contends that insufficient evidence existed because the testimony of the complainant and the other witnesses presented by the prosecution was not credible. We find this argument to be without merit. Under MCL 750.520h, “[i]t is a well-established rule that a jury may convict on the uncorroborated evidence of a CSC victim.” *People v Lemmon*, 456 Mich 625, 643 n 22; 576 NW2d 129 (1998)(citation omitted). Further, this Court will not interfere with the trier of fact’s role of determining the weight of the evidence and the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Viewing the evidence in a light most favorable to the prosecution, a rational jury could have found that the prosecution proved all elements of CSC-II beyond a reasonable doubt.

Defendant next contends that the prosecutor engaged in intentional misconduct by introducing evidence concerning defendant’s lack of cooperation with police. One of the investigating officers testified that, although defendant contacted him, he would not divulge his address or schedule an interview. Defendant asserts that the prosecution impermissibly argued that this provided substantive evidence of his guilt.

A claim of prosecutorial misconduct is reviewed de novo. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). We examine the conduct in context to determine whether the defendant was denied a fair and impartial trial. *People v Goodin*, 257 Mich App 425, 432; 668 NW2d 392 (2003). A prosecutor’s “good-faith effort to admit evidence does not constitute misconduct.” *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). Because defendant failed to preserve the issue, we review it only for plain error affecting his substantial rights. *Goodin, supra* at 431-432.

Defendant concedes that the evidence of his lack of cooperation and the prosecutor’s arguments did not violate his constitutional rights. However, he asserts that it was improper under the Michigan Supreme Court’s ruling in *People v Bigge*, 288 Mich 417; 285 NW 5 (1939). This rule “precludes the admission of evidence of a defendant’s failure to say anything in the face of an accusation as an adoptive or tacit admission of the truthfulness of the accusation under MRE 801(d)(2)(B) unless the defendant has ‘manifested his adoption or belief in its truth.’” *People v Shollaert*, 194 Mich App 158, 167; 486 NW2d 312 (1992). Tacit admissions are inadmissible because their relevancy relies solely on the defendant’s failure to make a denial. *People v Hackett*, 460 Mich 202, 213; 596 NW2d 107 (1999). But a defendant’s prearrest silence or failure to come forward is admissible for impeachment purposes. *Id.* at 213-214.

In *Hackett, supra* at 208, the prosecutor questioned the defendant concerning why he did not confront his accuser and codefendant when they were incarcerated together. During closing

arguments, the prosecutor asserted that this failure to confront his accuser provided evidence of the defendant's guilt. *Id.* at 209. The Court refused to apply *Bigge* and held as follows:

The silence referenced by the prosecutor did not occur in the face of an accusation. There is simply no statement that defendant's silence can be construed as tacitly adopting. Thus, the rule of *Bigge* is not violated by the admission of the evidence. [*Hackett, supra* at 215.]

In the instant case, Officer Tim Permoda, of the Michigan State Police, testified that after he contacted defendant's daughter, defendant telephoned him. He explained the reason he needed to speak with defendant and attempted to set up an interview, but was unable to get defendant's address. Defendant confirmed that he called Officer Permoda, but testified that he believed the investigation was actually a practical joke. He further testified that the officer only stated that he wanted to meet with him and would not explain why. On cross-examination, Officer Permoda stated that he did not remember if he had explained the nature of the allegations during the conversation. As in *Hackett*, the rule from *Bigge* does not apply. According to defendant's testimony, the investigating officer did not make an accusation or even describe the nature of the case. Thus, defendant's failure to respond or provide contact information cannot constitute a tacit admission.

Further, the relevancy of Officer Permoda's testimony relied on more than defendant's failure to make a denial. Rather, it constituted part of an attempt by the prosecution to explain a nearly two-year delay between the complainant's accusations and defendant's arrest. In addition to testifying to the telephone conversation, Officer Permoda stated that it took several months to obtain a warrant for defendant's arrest and even longer to locate defendant. Under *Ackerman, supra* at 448, the prosecution's good-faith presentation of this evidence cannot constitute misconduct.

Similarly, no misconduct occurred when the prosecution referred to the telephone conversation during closing arguments. During his testimony, defendant stated that he had been living openly in Texas and not hiding from anyone. In arguing that defendant's testimony was not worthy of belief, the prosecution referred to his failure to tell Officer Permoda where he was living. Prosecutors may impeach a defendant with prearrest silence and a failure to come forward and provide information. *People v Cetlinski (After Remand)*, 435 Mich 742, 757-760; 460 NW2d 534 (1990).

The prosecution's presentation of and argument concerning evidence of defendant's failure to provide contact information did not amount to prosecutorial misconduct. Therefore, no plain error affecting defendant's substantial rights occurred, and we deny further review. *Goodin, supra* at 431-432.

Defendant's related claim of ineffective assistance of counsel must also fail. He asserts that his trial counsel did not provide effective representation in that he failed to object or move for a mistrial when the prosecution referred to his telephone conversation with Officer Permoda. But defense counsel need not "make a meritless motion or a futile objection." *Goodin, supra* at 433. Thus, defendant did not receive ineffective assistance of counsel.

Finally, defendant asserts that the prosecution's closing arguments contained eight other forms of prosecutorial misconduct. Again, defendant has failed to preserve these claims and our review is limited to a determination of plain error affecting substantial rights. We find none.

Improper prosecutorial comments are grounds for reversal where they deny the defendant a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). But prosecutors are free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case. *Id.* at 282. They are given wide latitude and need not confine their arguments to the "blandest of all possible terms." *People v Kris Aldrich*, 246 Mich App 101, 112; 631 NW2d 67 (2001). Additionally, when reviewing an unpreserved claim of prosecutorial misconduct, this Court has found as follows:

Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of defendant's innocence. Thus, where a curative instruction could have alleviated any prejudicial effect we will not find error requiring reversal. [*Ackerman, supra* at 448-449 (citations omitted).]

Defendant first argues that the prosecution vouched for the credibility of the complainant. A prosecutor may not attempt to bolster his theory of the case by conveying a message that he has "some special knowledge or facts indicating the witness' truthfulness." *Bahoda, supra* at 276. But the prosecution "may argue from the facts that a witness, including the defendant, is not worthy of belief." *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996). As an advocate, the prosecution is permitted "to make fair comments on the evidence, including arguing the credibility of witnesses to the jury when there is conflicting testimony and the question of defendant's guilt or innocence turns on which witness is believed." *People v Flanagan*, 129 Mich App 786, 796; 342 NW2d 609 (1983)(citations omitted).

In the instant case, the prosecutor acknowledged that the case constituted a credibility contest between defendant and the complainant. She then argued that the complainant had less of a motivation to lie than did defendant. Rather than expressing a personal knowledge of facts indicating the complainant's truthfulness, this constituted a proper argument concerning credibility.

Next, defendant argues that the prosecution attempted to appeal to the jury's sympathy for the victim. This Court has held that such appeals are improper and provide grounds for reversal. *People v Dalessandro*, 165 Mich App 569, 581; 419 NW2d 609 (1988). However, in the instant case, no such appeal was made. The prosecution pointed out that because she agreed to testify, the complainant had to tell the "very private personal painful details of her life" to a courtroom full of strangers, and that this caused her great stress and anxiety. Rather than asking the jury to convict defendant out of sympathy, the prosecution argued that the complainant would not subject herself to such a situation if she were not telling the truth. Even if these statements were an improper appeal for sympathy, the trial court instructed the jury to not let sympathy or prejudice influence its decision. Such an instruction eliminated any prejudice caused by this type of argument. *People v Watson*, 245 Mich App 572, 592; 629 NW2d 411 (2001).

Defendant also alleges that the prosecution made personal attacks against defendant's counsel and that this had the effect of denigrating both the defendant and his defense. The conduct complained of consists of the following statement made during the prosecution's closing argument:

Now, defendant on the other hand has been trying to create reasonable doubt. His job is to try and throw those red hearings [sic] out at you, trying to make you think oh no, there's not enough here to convict him of the crime. Well, lets [sic] look at some of those things that perhaps maybe the defendant thinks is [sic] reasonable doubt, but in reality just creates more reason to convict him of the crime.

Defendant argues that this amounted to an accusation that defense counsel was intentionally trying to mislead the jury.

Prosecutors must refrain from denigrating a defendant with intemperate and prejudicial remarks. *Bahoda, supra* at 283. They "may not suggest that defense counsel is intentionally attempting to mislead the jury." *Watson, supra* at 592. However, rather than accusing defendant of trying to deceive the jury, the prosecutor merely stated that the defense counsel would argue that alternate conclusions could be drawn from the evidence presented. This constitutes a fair argument. *Aldrich, supra* at 112. Even if the prosecutor's argument was improper, the trial court instructed the jury that the arguments of counsel are not evidence. This instruction dispelled any prejudice that might have resulted.

Defendant next argues that the prosecution similarly denigrated defendant by stating that it was absurd that there was a trial and that child sex abusers were crazy and abnormal and that their behavior was not capable of being rationalized. Defendant further contends that this constituted an invitation for the jury to convict defendant out of a sense of civic duty. Rather than an attack on defendant or a civic duty argument, this statement constituted a proper appeal to the jury. The prosecutor exhorted the jurors to decide the case on the evidence rather than emotion. Even if they did not want to believe that anyone would ever sexually abuse a child, they should listen to and make their decision based on the testimony.

In his next claim of prosecutorial misconduct, defendant asserts that the prosecutor argued facts that were not in evidence. He alleges that this occurred when the prosecutor attempted to explain why the complainant failed to immediately disclose the abuse. The prosecution stated that it was sensible for a ten-year-old to keep something like this to herself and to be afraid of getting into trouble. Defendant argues that this constituted misconduct because the complainant never testified that she was in fear of getting into trouble or was threatened in any way that might have prevented disclosure.

"A prosecutor may not make a statement of fact to the jury that is unsupported by the evidence in the case." *People v Fisher*, 193 Mich App 284, 291; 483 NW2d 452 (1992). However, in the instant case, the complainant testified that she did not tell her mother of the abuse because she was scared. Carmen Kucinich, a forensic interviewer and therapist with the Allegan County Prevention of Child Abuse and Neglect Council, testified that abused children who delay disclosing what occurred often believe that they are partially at fault. A reasonable

inference from this testimony is that the complainant may have been afraid of getting into trouble. Based on *Bahoda, supra*, we find no misconduct.

Finally, defendant claims that the prosecution mischaracterized the evidence. However, he fails to explain when this occurred or what evidence was mischaracterized. A party may not leave it to this Court to search for the factual basis to sustain or reject his position. *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001). Therefore, we decline to review this issue.

None of the asserted instances of prosecutorial misconduct amount to plain error. Because defendant did not preserve the issue at trial, it is forfeited and we deny further review. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Affirmed.

/s/ Christopher M. Murray
/s/ William B. Murphy
/s/ Jane E. Markey